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IN THE

# Supreme Court of the United States

October Term, 1965.

No. 75

THE ÆTNA CASUALTY AND SURETY COMPANY,
*Petitioner,*

*v.*

THIRD NATIONAL BANK AND TRUST COMPANY,
Of Scranton,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ELMER W. BEASLEY,
151 Farmington Avenue,
Hartford, Connecticut 06115
*Counsel for Petitioner.*

EDWARD W. WARREN,
JOSEPH C. KREDER,
700 Scranton Electric Building,
Scranton 3, Pennsylvania.
*Of Counsel.*

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

# INDEX.


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statutes | 3 |
| Statement of the Case | 4 |
| Reasons for Granting the Writ | 8 |
| Conclusion | 14 |
| Appendix | 15 |
| Opinion of the Court | 16 |
| Judgment | 16 |
| Order Denying Rehearing | 17 |
| Order Staying Mandate | 17 |
| Statutes Involved | 18 |
| Uniform Commercial Code | 18 |
| Pennsylvania Penal Code | 21 |

## TABLE OF CASES CITED.


| | Page |
|---|---|
| Allshouse v. Ramsey, 1841, 6 Whart. 331 | 9 |
| Benners v. Clemens, 1868, 58 Pa. 24 | 9 |
| Black & Yates v. Mahogany Assn., 3 Cir., 1941, 129 F. 2d 227 | 8 |
| Blue Ridge Textile Co. v. The Travelers Indemnity Co., 407 Pa. 463, 181 A. 2d 295 | 10 |
| Com. v. Wilson, 44 Pa. Super. 183 | 12 |
| Ehrlich v. United States Fidelity & Guaranty Co., 356 Pa. 417, 51 A. 2d 794 | 10 |
| Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 | 8 |
| Exchange National Bank of Olean v. Insurance Co. of N. America, 2 Cir., 1965, 341 F. 2d 673, cert. den. | 12 |
| Faron v. Penn Mutual Life Ins. Co., 3 Cir., 176 F. 2d 290 | 8 |
| Fidelity Trust Co. v. American Surety Co., 268 F. 2d 805 | 3, 7, 8, 9, 12 |
| First Nat. Bank & Trust Co. of Oklahoma City v. United States Fidelity & Guaranty Co., 10 Cir. 1965, 347 F. 2d 945 | 12 |
| Gilbert v. United States (1962), 370 U. S. 650, 82 S. Ct. 1399 | 13 |
| Hardiman v. Fire Assn. of Philadelphia (1905), 212 Pa. 383, 61 A. 990 | 9 |
| Hudson v. Moonier, 304 U. S. 397, 58 S. Ct. 954 | 9 |
| Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 61 S. Ct. 1020 | 8, 10 |
| McClure v. Commonwealth of Pennsylvania (1878), 86 Pa. 353 | 12 |
| Mutual Benefit, Health and Accident Assn. v. Bowman, 304 U. S. 549, 58 S. Ct. 1056 | 9 |
| New York Life Ins. Co. v. Jackson, 304 U. S. 261, 58 S. Ct. 871 | 8 |
| North Carolina Nat. Bank v. United States Casualty Co., 4 Cir., 317 F. 2d 304, cert. den., 375 U. S. 905, 84 S. Ct. 193 | 12 |

## TABLE OF CASES CITED (Continued).


| | Page |
|---|---|
| Patton v. Patton, 413 Pa. 566, 198 A. 2d 578 | 10 |
| Philadelphia Title Insurance Co. v. Fidelity-Philadelphia Trust Co. (1965), 419 Pa. 78, 212 A. 2d 222 | 11 |
| Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290 | 8, 9, 10 |
| Skelly v. Fidelity & Casualty Co. of New York, 313 Pa. 202, 169 A. 78 | 10 |
| State Bank of Poplar Bluff v. Maryland Casualty Co., 8 Cir., 289 F. 2d 544 | 12 |
| The First Nat. Bank of Memphis v. The Ætna Casualty and Surety Co., 6 Cir., 309 F. 2d 702, cert. den., 372 U. S. 953, 83 S. Ct. 951 | 12 |
| The First Nat. Bank of South Carolina of Columbia v. Glens Falls Ins. Co., 4 Cir., 304 F. 2d 866 | 12 |
| Topkis v. Rosenzweig, 333 Pa. 529, 5 A. 2d 100 | 10 |
| United States v. Carabasi, 3 Cir., 292 F. 2d 362 | 13 |
| W. G. Ward Lumber Co. v. American L. & Mfg. Co. (1915), 245 Pa. 267, 93 A. 470 | 9 |
| Watson v. Metropolitan Life Ins. Co., 1941, 145 Pa. Super. 369, 21 A. 2d 503 | 9 |


## STATUTES CITED.


| | Page |
|---|---|
| Pennsylvania Penal Code, 18 P. S., Sections 5010 to 5014 | 3, 11 |
| Uniform Commercial Code, 12A P. S. 1-101 et seq. | 3, 6, 11 |
| 7 U. S. C. A., Section 1622(h) | 13 |
| 28 U. S. C., Section 1254(1), 28 U. S. C. A., Section 1254(1) | 2 |
| 28 U. S. C., Section 1332 | 4 |

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1965.

No. ———.

THE ÆTNA CASUALTY AND SURETY COMPANY,
*Petitioner,*

*v.*

THIRD NATIONAL BANK AND TRUST COMPANY, OF SCRANTON,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on December 9, 1965.

## OPINIONS BELOW.

The Memorandum Opinion of the District Court for the Middle District of Pennsylvania (R. 57a-64a), filed July 10, 1964 is not reported. The *Per Curiam* Opinion of the Court of Appeals for the Third Circuit (App. 15, 16), filed on December 9, 1965, is not reported. The order denying petitioner's petition for rehearing *en banc* was entered on January 3, 1966, and is not reported.

## JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on December 9, 1965, and a copy thereof is appended to this petition in the Appendix at p. 16. The order of the Court of Appeals for the Third Circuit denying rehearing *en banc* was entered on January 3, 1966, and a copy thereof is appended to this petition in the Appendix at p. 17. An order of the Court of Appeals for the Third Circuit was entered on January 12, 1966 to stay the mandate until February 7, 1966, and a copy thereof is appended to this petition in the Appendix at p. 17. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C., Section 1254(1), 28 U. S. C. A., Section 1254(1).

## QUESTIONS PRESENTED.

1. Whether a Bankers Blanket Bond which was executed and delivered to the insured in Pennsylvania is governed by Pennsylvania law with respect to questions concerning the proper construction of its language and the nature of its obligations?

2. Whether, in this diversity action brought by respondent, seeking indemnity under petitioner's bond, executed and delivered in Pennsylvania, for losses resulting from loans it made in Pennsylvania on security of nonexistent accounts receivable which were described in unsigned copies of false invoices attached to the security agreements, the federal court must ascertain and apply the substantive law of Pennsylvania which governs the questions presented by the record in this case?

3. Whether, under the rule of construction as applied by the Supreme Court of Pennsylvania to insurance con-

tracts, there is any ambiguous language in Insuring Clause (E) of petitioner's bond which requires the federal court to invoke any rule of construction against the insurer?

4. Whether, under Pennsylvania commercial law, unsigned copies of invoices for goods are writings which were contemplated by the parties when they used the terms *securities, documents or other written instruments* to describe and specify the writings within the coverage of Insuring Clause (E) of the bond?

5. Whether, under Pennsylvania law, unsigned copies of genuinely made but false invoices, purporting to be carbon copies of the originals, are counterfeited written instruments within the coverage of Insuring Clause (E) of petitioner's bond which is limited to loss sustained through the extension of credit on the faith of *securities, documents or other written instruments* which prove to have been *counterfeited or forged as to the signature of* any maker, drawer, issuer, endorser, assignor, lessee, transfer agent or registrar, acceptor or guarantor, or *as to the signature of* any person signing in any other capacity, as the court below has held by adhering to its former decision in *Fidelity Trust Co. v. American Surety Co.*, 268 F. 2d 805?

## STATUTES.

The pertinent provisions of the Uniform Commercial Code, 12A P. S., Sections 1-101, et seq.; and the Pennsylvania Penal Code, 18 P. S., Sections 5010 to 5014. The pertinent texts are appended to this petition in the appendix at pp. 18-23.

## STATEMENT OF THE CASE.

Plaintiff, respondent here, brought this action in the District Court for the Middle District of Pennsylvania, pursuant to 28 U. S. C., Section 1332, because the parties are citizens of different states and the amount in controversy exceeded ten thousand dollars, to recover losses it alleges it sustained within the coverage of a Bankers Blanket Bond, Standard Form No. 24, which petitioner executed and delivered to it at its place of business in Scranton, Pennsylvania, on May 1, 1959 (R. 5a; R. 10a). The bond covers several risks which are specifically set forth in Insuring Clauses (A) to (G), inclusive. The pertinent provisions of the bond, including the seven insuring clauses, are set forth in context in the record at pp. 35a to 39a.

Respondent claims indemnity under Insuring Clause (E) which, so far as material to this action, provides as follows:

"Securities".

"(E) Any loss through the insured's having * * * extended any credit * * * on the faith of * * * any *securities, documents or other written instruments* which prove to have been *counterfeited or forged as to the signature of* any maker, drawer, issuer, endorser, assignor, lessee, transfer agent or registrar, acceptor, surety or guarantor or *as to the signature of* any person signing in any other capacity, * * *.

"Mechanically reproduced facsimile signatures are treated the same as handwritten signatures." (Emphasis supplied.)

The record shows that the bond is a standard form of contract which was designed by the parties for use in all fifty states and the District of Columbia to insure commercial banks and trust companies against loss arising out of such specific risks as the surety industry was willing to insure and the banking industry was willing to purchase at an agreed premium. The record also shows that the lan-

guage used in the several insuring clauses to express the intent of the parties respecting the risks to be covered and the risks to be excluded from coverage was agreed upon in conferences between committees of the American Bankers Association, of which respondent is a member, and The Surety Association of America, of which petitioner is a member (Ex. B; R. 41a-46a).

The record further shows that the word "blanket" in a blanket bond refers to the blanket *amount* which applies to the several risks covered under the bond and it is not intended to mean "all risk" coverage (R. 42a, lines 21, 22, 23).

Between November 28, 1961 and February 27, 1962, respondent made five separate loans to Scranton Storage Battery Corporation, through one Morry Hollow, its sole stockholder and chief executive officer, taking as security for the payment thereof assignments of five separate accounts receivable for goods purportedly sold to a customer which were in fact nonexistent. Hollow, or someone under his direction, typed up invoices addressed to the customer, and described therein goods which were never sold to the customer. The invoices described wholly fictitious and nonexistent accounts. Hollow attached the copies of the false invoices to the assignments contained in the security agreements which he delivered to respondent as security for the five loans (R. 21a; R. 29a).

Each of the loans was evidenced by a demand promissory note. Scranton Storage Battery Corporation, through Hollow, executed a security agreement, containing an assignment of a nonexistent account receivable which was listed on a schedule attached thereto, and which was described in a copy of a false invoice for that particular account (R. 21a; R. 28a).

Respondent loaned a total of $19,040.48 on security of the five nonexistent accounts receivable. The total amount of the invoices describing the nonexistent accounts was $24,711.31, the amount claimed in this action to be the amount of respondent's loss (R. 22a; R. 30a).

All signatures on the promissory notes, the security agreements, and the schedules listing the nonexistent accounts are genuine. The copies of the false invoices attached to the security agreements contained no signatures whatever (R. 23a).

The copies of the false invoices were genuinely made by Scranton Storage Battery Corporation, through Hollow, or under his direction, and they showed on their face that they were carbon copies of the original invoices purportedly sent to the customer (R. 21a; R. 57a, 58a).

Respondent alleged in its complaint (R. 5a, 8a), that the unsigned copies of false invoices attached to the security agreements "were fictitious and counterfeit." In its answer (R. 10a, 11a), petitioner specifically denied that the unsigned copies of invoices were counterfeit. It set up affirmative defenses which pleaded the Exclusion Section 1(d) of the bond (R. 13a); that the unsigned copies of invoices were not *securities, documents or other written instruments* within the meaning of those terms as defined in the Uniform Commercial Code, 12A P. S. 1-101 et seq., or within the meaning of those terms as used in the bond (R. 13a-15a); and that unsigned copies of invoices were not subjects of counterfeiting under the common law, under the law of Pennsylvania, or within the meaning of the bond which limited coverage to *securities, documents or other written instruments* which have been *counterfeited or forged as to the signature* of a party signing in some capacity (R. 15a).

At the pre-trial conference, petitioner submitted a statement of five questions involved in the case (R. 23a, 24a), which were essentially the same questions presented in this petition.

The case was submitted to the District Court on petitioner's motion for summary judgment (R. 25a). On July 10, 1964, the District Judge filed a Memorandum Opinion (R. 57a-64a), in which he stated that the identical language contained in Insuring Clause (E) was interpreted

"by our Third Circuit Court of Appeals in Fidelity Trust Company v. American Surety Company, 268 F. 2d 805 (3d Cir. 1959)" (R. 59a). After summarizing the holding of the court in the *Fidelity* case, and commenting on petitioner's contention that the *Fidelity* case was not controlling in this action, since it did not purport to apply Pennsylvania law, and unsigned copies of invoices could not be classified as written instruments as defined in the Pennsylvania statutes, the District Judge stated: "I am not persuaded to adopt such a limited construction in favor of the insurer. If defendant intended to confine its liability to those 'written instruments' as defined in the Uniform Commercial Code, it would have been a relatively simple task to do so. * * *. I realize that this case involves a commercial transaction in the area where the Uniform Commercial Code is frequently applied. However, it should not avail the insurer to fall back on a composite of definitions contained in the Uniform Commercial Code in order to place a conclusive interpretation on the coverage clause in an insurance contract. Consequently, it is my determination that the term 'written instruments' in the commercial field cannot be conclusively confined to negotiable instruments as defined in the Uniform Commercial Code. Further, if the rationale of the Fidelity decision is as faulty and erroneous as defendant contends, then that court, and not this one, will have to overturn it" (R. 60a, 61a, 62a). Judgment was entered against petitioner for $6,958.43 (R. 64a).

On appeal, the Court of Appeals affirmed the judgment of the District Court in a *Per Curiam* opinion (App. 16), in which it said it was bound by its decision in *Fidelity Trust Co. v. American Surety Co.*, 268 F. 2d 805, since the appeal was not heard *en banc*.

Petitioner presented a petition for a rehearing *en banc*, but on January 3, 1966, rehearing was denied with Circuit Judges Biggs, Smith, and Freedman noting their dissent from the denial of rehearing (App. 17).

## REASONS FOR GRANTING THE WRIT.

### I.

The decision of the court below should be reviewed for the reason that neither the District Court nor the Court of Appeals applied the law of Pennsylvania in their considerations of the questions presented in the case. By disregarding the applicable law of Pennsylvania, and by adopting the decision of the Court of Appeals in *Fidelity Trust Co. v. American Surety Co.*, 3 Cir., 1959, 268 F. 2d 805, which neither considered nor applied Pennsylvania law, the decision in this case is in direct conflict with the decisions of this Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188; *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290; and *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487, 61 S. Ct. 1020.

In each of the cases cited above, this Court has held that the federal court in a diversity action must ascertain what the law of the state is, and apply it in resolving the questions at issue. The decision of the Court of Appeals in this case is at variance with its own prior decision in *Black & Yates v. Mahogany Assn.*, 3 Cir., 1941, 129 F. 2d 227, 233, wherein it held: "As to the substantive rights, the cases are clear that the rules of substantive law to be applied in a federal equity court in a diversity case are those which would be applied in a state court sitting in the same state." See also *Faron v. Penn Mutual Life Ins. Co.*, 3 Cir., 176 F. 2d 290.

The Court of Appeals, by refusing to ascertain and apply the applicable law of Pennsylvania, has adopted a procedure which is in direct conflict with the decisions of this Court, and a review should be granted in the exercise of this Court's powers of supervision. See *New York Life Ins. Co. v. Jackson*, 304 U. S. 261, 58 S. Ct. 871;

*Hudson v. Moonier,* 304 U. S. 397, 58 S. Ct. 954; and *Mutual Benefit, Health and Accident Assn. v. Bowman,* 304 U. S. 549, 58 S. Ct. 1056.

## II.

The decision of the court below should be reviewed for the additional reason that it has decided a most important question of Pennsylvania law in a way which is in direct conflict with the law of that state as declared by its legislature in statutes and by its highest court in judicial decisions.

In this case, the District Judge followed the decision of the Court of Appeals in *Fidelity Trust Co. v. American Surety Co.,* 3 Cir., 268 F. 2d 805, both in the construction of the bond and on the question of counterfeiting (Memo. op.; R. 57a, 59a, 60a, 61a, 62a). The Court of Appeals held in its *Per Curiam* opinion that it was bound by the *Fidelity* decision, and so affirmed the judgment of the District Court. The *Fidelity* decision thus becomes the decision in this case, and therefore the law of the case. The *Fidelity* case did not purport to follow Pennsylvania law, but on the contrary applied general rules for the reason that no Pennsylvania law was cited to it (268 F. 2d 805, 807). The decision is definitely in conflict with the applicable Pennsylvania law.

The bond in this case was definitely executed and delivered in Pennsylvania (R. 5a, 10a), a fact which was not known to the Court in *Fidelity* (268 F. 2d 805, 807). The bond involved in this action is a Pennsylvania contract. *Hardiman v. Fire Assn. of Philadelphia* (1905), 212 Pa. 383, 61 A. 990, 991; *W. G. Ward Lumber Co. v. American L. & Mfg. Co.* (1915), 245 Pa. 267, 93 A. 470. Therefore, questions arising in the case concerning the proper construction of the contract, and the nature and extent of its obligations are governed by Pennsylvania law. *Allshouse v. Ramsey,* 1841, 6 Whart. 331; *Benners v. Clemens,* 1868, 58 Pa. 24; *Watson v. Metropolitan Life Ins. Co.,* 1941, 145 Pa. Super. 369, 21 A. 2d 503, 510; *Ruhlin v.*

*New York Life Ins. Co.*, 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290; and *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487, 61 S. Ct. 1020.

Under the rules of construction of insurance contracts as applied by the Supreme Court of Pennsylvania, there is no ambiguity in the contract and a construction cannot be adopted which conflicts with the plain meaning of the language employed to express the intent of the parties. *Skelly v. Fidelity & Casualty Co. of New York*, 313 Pa. 202, 169 A. 78; *Topkis v. Rosenzweig*, 333 Pa. 529, 5 A. 2d 100, 101; *Ehrlich v. United States Fidelity & Guaranty Co.*, 356 Pa. 417, 51 A. 2d 794; *Blue Ridge Textile Co. v. The Travelers Indemnity Co.*, 407 Pa. 463, 181 A. 2d 295, 299; *Patton v. Patton*, 413 Pa. 566, 198 A. 2d 578, 582.

In *Patton v. Patton, supra*, the Supreme Court of Pennsylvania stated the rules by which the liability under an insurance contract must be measured in these words:

> "* * * (b) An insurance 'policy like every other contract, must be read in its entirety and the intent gathered from a consideration of the entire instrument.' * * * (c) If the language of the policy is uncertain or ambiguous, then, and only then, must the policy be construed most strongly against the insurer * * *; (d) If the language of the policy is certain and unambiguous, a construction cannot be adopted which conflicts with the plain meaning of such language * * *, unless the construction be 'manifestly absurd, or effectually prevent a recovery under all circumstances' * * *."

In *Fidelity*, the court did not have before it the Pennsylvania rules of construction, for indeed they were not called to its attention. Instead, it imported an ambiguity into the bond, and it then proceeded to construe the bond against the insurer as if it provided all risk coverage. This is manifest from its language: "Its very term 'Blanket Bond' indicates that its coverage is to be wide and it is not unfair to interpret the document in this fashion." The

record shows (Ex. B; R. 41a, 42a, last Sent., 2d par.) that the word "blanket" appearing in the title of the bond does not mean all risk coverage, and that is the understanding of the insurer and the insured alike. Moreover, the illustration in support of the court's construction against the insurer is contradicted by an illustration written by the Insurance and Protective Committee of the American Bankers Association, and appearing on pages 18 and 19 of *Digest of Bank Insurance* (Ex. B; R. 41a, 45a, 46a). This general rule of construction against the insurer is in direct conflict with the applicable law of Pennsylvania.

The question whether unsigned copies of invoices are the writings embraced by the terms *securities, documents or other written instruments* within the coverage of the bond was decided in a way directly in conflict with the substantive law of Pennsylvania as declared by its legislature in the Uniform Commercial Code which clearly defined the terms. 12A P. S., Sections 9-105(1), (e), (g), 9-309; 12A P. S., Sections 8-102; 8-105(1); 8-201; 8-205; 8-208; 8-311; 8-312; 12A P. S., Section 1-201(15), (18), (40), (43); 12A P. S., Sections 3-102(1), (e); 3-104(a); 3-401(1); 3-404. The Supreme Court of Pennsylvania has held that the Uniform Commercial Code controls the transactions involving commercial paper, and other transactions within its scope, regardless of what the previous law might have been. *Philadelphia Title Insurance Co. v. Fidelity-Philadelphia Trust Co.* (1965), 419 Pa. 78, 212 A. 2d 222. Certainly, unsigned writings cannot be classified as being in the category of securities, or something in the nature of securities, within the definitions in the Uniform Commerical Code, or in the earlier statutes which the Uniform Commercial Code replaced.

The decision of the Court of Appeals in this case is also directly in conflict with the law of Pennsylvania in holding that unsigned copies of invoices are counterfeit written instruments, for the Pennsylvania counterfeiting and forgery statutes, 18 P. S., Sections 5010-5014 clearly exclude unsigned writings from the subjects of counterfeit-

ing. Moreover, where the falsity lies in the representations of facts, and not in the execution, there is no counterfeiting under those statutes. It is clearly the law of Pennsylvania that, in order to be either a counterfeit or a forgery, the act must purport to be the act of some person other than the counterfeiter or forger. *McClure v. Commonwealth of Pennsylvania* (1878), 86 Pa. 353; *Com. v. Wilson,* 44 Pa. Super. 183.

## III.

The decision of the court below is in direct conflict with the decisions of the Courts of Appeals in the Second Circuit, *Exchange National Bank of Olean v. Insurance Co. of N. America,* 2 Cir., 1965, 341 F. 2d 673, cert. den.; in the Fourth Circuit, *The First Nat. Bank of South Carolina of Columbia v. Glens Falls Ins. Co.,* 4 Cir., 304 F. 2d 866; *North Carolina Nat. Bank v. United States Casualty Co.,* 4 Cir. 317 F. 2d 304, cert. den., 375 U. S. 905, 84 S. Ct. 193; in the Sixth Circuit, *The First Nat. Bank of Memphis v. The Ætna Casualty and Surety Co.,* 6 Cir., 309 F. 2d 702, cert. den., 372 U. S. 953, 83 S. Ct. 951; in the Eighth Circuit, *State Bank of Poplar Bluff v. Maryland Casualty Co.,* 8 Cir., 289 F. 2d 544; and in the Tenth Circuit, *First Nat. Bank & Trust Co. of Oklahoma City v. United States Fidelity & Guaranty Co.,* 10 Cir. 1965, 347 F. 2d 945.

In each of those cases, the same identical bond and the same identical questions were involved as are involved in this case, and in each of those cases, the bank relied on *Fidelity Trust Co. v. American Surety Co.,* 3 Cir., 268 F. 2d 805. In each of those cases, the state law applicable to them on both the question of construction of the bond and the question of counterfeiting was the same, or substantially the same, as the Pennsylvania law. In each case, the court rejected the view of the Court of Appeals in the *Fidelity* case, and applied the applicable state law to hold that there was no ambiguity in the bond, and where the falsity of the writings lay in their misrepresentation of facts, and not in the genuineness of their execution,

they were neither counterfeited nor forged within the coverage of Insuring Clause (E) of the bond. The conflict arises by reason of the fact that the Court of Appeals for the Third Circuit has failed to follow the applicable state law, but has chosen instead to adopt general rules of construction against the insurer without regard to the meaning of the language used by the parties.

The decision of the court below on the question of counterfeiting is at variance with its own decision in *United States v. Carabasi*, 3 Cir., 292 F. 2d 362. In that case, Carabasi was indicted under 7 U. S. C. A., Section 1622(h) for having marked certain meat as "U. S. D. A. Prime" grade, whereas the true grade of the meat was "U. S. D. A. Choice." He was prosecuted under a statute which made it a crime to "falsely make, issue, alter, forge, or counterfeit any official certificate * * * mark or other identification, * * * with respect to inspection, class, grade, quality, etc." The court held first that the statute was intended to proscribe conduct tantamount to forgery, and where the falsity lay in the misrepresentation of facts, and not in the making or execution, it was neither counterfeiting nor forgery.

Certain it is that the meaning of counterfeiting and forgery under the bond is no broader than the meaning in the criminal statutes, and the federal criminal statutes and the Pennsylvania criminal statutes contain substantially the same language.

The decision of the court below is also in direct conflict with the decision of this Court in *Gilbert v. United States* (1962), 370 U. S. 650, 82 S. Ct. 1399, which held: "* * *. Where the 'falsity lies in the representation of facts, not in the genuineness of execution,' it is not forgery. *Marteny v. United States, supra,* 216 F. 2d at 763-764. * * *."

## IV.

Finally, the decision of the court below should be reviewed for the reason that this case involves principles,

the settlement of which is of great importance to the public in general and to the banking and insurance industries in particular. The Uniform Commercial Code has been adopted in forty-two of the fifty states. It has been adopted in two of the three states which comprise the Third Circuit. A bill for its adoption is pending before the Delaware Legislature. Those three states constitute a large financial community. The bond involved in this action is used by commercial banks in all fifty states. The risks which it is designed to cover are controlled to a very great extent by the Uniform Commercial Code; especially the risks of counterfeiting, forgery, and allied acts of evil import. The public in general, and the banking and insurance industries in particular, will benefit greatly by uniformity in the law which governs the transactions out of which losses may arise. Cases arising in the states comprising the Third Circuit should not be decided on the basis of general rules of law which are at variance with the rules applied in the individual states. One party should not fare better by bringing his action in the federal court than he would fare if the action were brought in the state court. This Court should grant a review of the case in the interest of uniformity.

## CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ELMER W. BEASLEY,
151 Farmington Avenue,
Hartford, Connecticut. 06115
*Counsel for Petitioner.*

EDWARD W. WARREN,
JOSEPH C. KREDER,
700 Scranton Electric Building,
Scranton 3, Pennsylvania.
*Of Counsel.*

# APPENDIX.

## OPINION OF THE COURT OF APPEALS.

No. 15027

THIRD NATIONAL BANK AND TRUST COMPANY OF SCRANTON,

*Appellant,*

*v.*

THE ÆTNA CASUALTY AND SURETY COMPANY

No. 15028

THIRD NATIONAL BANK AND TRUST COMPANY OF SCRANTON,

*v.*

THE ÆTNA CASUALTY AND SURETY COMPANY,

*Appellant.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued March 4, 1965

Before BIGGS, *Chief Judge,* and FORMAN and FREEDMAN, *Circuit Judges.*

## OPINION OF THE COURT

(Filed December 9, 1965)

Per Curiam.

In view of the decision of this court in Fidelity Trust Co. v. American Surety Co. of New York, 268 F. 2d 805 (1959), the appeals at bar not having been heard by the court en banc, we are bound by that decision. The judgment of the court below therefore will be affirmed. Cf. Exchange Nat. Bank of Olean v. Insurance Co. of No. Amer., 341 F. 2d 673 (2 Cir. 1965) *cert. denied* U.S. (1965), and First Nat. B. & T. Co. of Oklahoma City v. United States F. & G. Co., 347 F. 2d 945 (10 Cir. 1965).

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## JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 10, 1964, be, and the same is hereby affirmed, with costs.

ATTEST:

IDA O. CRESKOFF, Clerk

December 9, 1965

No. 15028

## ORDER DENYING REHEARING.

Present: KALODNER, *Chief Judge,* and BIGGS, MCLAUGHLIN, STALEY, HASTIE, FORMAN, GANEY, SMITH and FREEDMAN, *Circuit Judges*

The petition for rehearing filed by The Ætna Casualty and Surety Company, *Appellant* in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

BIGGS
Circuit Judge

Dated: January 3, 1966

Biggs, Smith and Freedman, Circuit Judges, dissent from the denial of rehearing.

## ORDER STAYING MANDATE.

Pursuant to Rule 36(2) of this Court, it is ORDERED that issuance of the mandate in the above cause be, and it is hereby stayed until February 7, 1966.

BIGGS
Circuit Judge

Dated: JANUARY 12, 1966

## STATUTES INVOLVED.

### Uniform Commercial Code.

12A P. S., Section 1-201. General Definitions.

"Subject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Act:

* * *

"(15) 'Document of Title' includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

* * *

"(18) 'Genuine' means free of forgery or counterfeiting.

* * *

"(39) 'Signed' includes any symbol executed or adopted by a party with present intention to authenticate a writing.

"(40) 'Surety' includes guarantor.

* * *

"(43) 'Unauthorized signature or endorsement' means one made without actual, implied or apparent authority and includes a forgery."

12A P. S. 9-105. Definitions and Index of Definitions.

"(1) In this Article (9,—Secured Transactions), unless the context otherwise requires:

* * *

"(e) 'Document' means document of title as defined in the general definitions of Article 1 (Section 1-201);

* * *

"(g) 'Instrument' means a negotiable instrument (defined in Section 3-104), or a security (defined in Section 8-102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary endorsement or assignment;"

* * *

12A P. S., Section 9-309. Protection of Purchasers of Instruments and Documents.

"Nothing in this Article limits the rights of a holder in due course of a negotiable instrument (Section 3-302) or a holder to whom a negotiable document of title has been duly negotiated (Section 7-501) or a bona fide purchaser of a security (Section 8-301) and such holders or purchasers take priority over an earlier security interest even though perfected. Filing under this Article does not constitute notice of the security interest to such holders or purchasers."

12A P. S., Section 8-102. Definitions and Index of Definitions.

"(1) In this Article unless the context otherwise requires

"(a) A 'security' is an instrument which

(i) is issued in bearer or registered form; and

(ii) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and

(iii) is either one of a class or series or by its terms is divisible into a class or series of instruments;"

* * *

12A P. S., Section 8-105. Securities Negotiable; Presumptions.

"(1) Securities governed by this Article are negotiable instruments.

* * *

12A P. S., Section 3-102. Definitions and Index of Definitions.

"(1) In this Article unless the context otherwise requires

* * *

"(e) 'Instrument' means a negotiable instrument.

12A P. S., Section 3-104. Form of Negotiable Instrument; * * * "Note".

"(1) Any writing to be a negotiable instrument within this Article must

(a) be signed by the maker or drawer; and

(b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; and

(c) be payable on demand or at a definite time; and

(d) be payable to order or to bearer.

"(2) A writing which complies with the requirements of this section is * * *

* * *

(b) A 'note' if it is a promise other than a certificate of deposit."

12A P. S., Section 3-401. Signature.

"(1) No person is liable on an instrument unless his signature appears thereon.

"(2) A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature."

**Pennsylvania Penal Code.**

18 P. S., Section 5010. Counterfeiting, altering and passing bank notes, checks, scrip or drafts.

"Whoever falsely and fraudulently makes, forges, alters, or counterfeits, or causes or procures to be falsely made, forged, altered or counterfeited, or willingly aids or assists in the false making, forging, altering, or counterfeiting, any bill, scrip, note, order, check or draft, or imitation of, or purporting to be, a bill, scrip, note, order, check or draft issued by order of or drawn on the president, cashier, directors and company of any bank incorporated by the laws of this Commonwealth, or by the laws of any of the states or territories of the Union or of the District of Columbia, or any clearing house association comprised of or maintained by any such banks, or by the Commonwealth or any municipality therein; * * * is guilty of a felony, * * *."

18 P. S. 5011. Making; possession of plates; bank note paper, etc.

"Whoever makes, engraves or prepares, or causes to be made, engraved or prepared, or has in his custody or

possession any metallic or other plate or substance, either made, engraved or prepared after the similitude of any plate from which any notes, scrip or bills issued by any banks or clearing houses, incorporated by the laws of this commonwealth or by the laws of any other state or territory or of the District of Columbia, or by the Commonwealth or any municipality therein, shall have been printed, or taken, or wherefrom and by means whereof notes, scrip or bills may be made, engraved or prepared after the similitude of notes, scrip or bills issued by any such bank or clearing house, or by the Commonwealth or any municipality therein, with intent to use such plate or substance, or to cause or suffer the same to be used in forging or counterfeiting any of the notes, scrip or bills issued by any of the said banks or clearing houses, or by the Commonwealth or any municipality therein, * * * is guilty of felony, * * *."

18 P. S., Section 5012. Counterfeiting United States, state or corporation bonds and coupons.

"Whoever falsely and fraudulently makes, forges or counterfeits, or causes or procures, or willingly aids, or assists in making, forging, counterfeiting or altering any bond, coupon, or other instrument of writing for the payment of money, purporting to be or to be attached to or form part of any bond, or obligation, issued by the United States, by this, or any other state, or territory, or any municipal or other corporation, company or individual, * * * is guilty of felony, * * *."

18 P. S., Section 5013. Making or possessing plates or paper for counterfeit bonds.

"Whoever makes, engraves or prepares, or causes or procures to be made, engraved, or prepared, or has in his custody or possession any plate, or substance, from which any bond, note, coupon or other instrument, issued by the United States, or this, or any other state or territory, or

any corporation, company or individual, has been printed, or taken, or wherefrom, or by means whereof, bonds, notes, coupons or other instruments for the payment of money, may be made, printed or prepared, after the similitude of such bonds, notes, coupons or other instruments, issued as aforesaid, with intent to use such plate or substance, or cause or suffer the same to be used, in forging, or counterfeiting, any of the instruments aforesaid, or has in his or her possession, or custody, any paper adapted to the making of any such bonds, notes, coupons or other instruments, similar to the paper on which said obligations, or evidences of debt, has been issued, with intent to use such paper, or suffer the same to be used, in forging or counterfeiting such instruments, is guilty of felony, * * *."

18 P. S., Section 5014. Forgery and uttering forged instruments.

"Whoever fraudulently makes, signs, alters, utters or publishes, or is concerned in the fraudulently making, signing, altering, uttering or publishing any written instruments, to the prejudice of another's right, with intent to defraud any person or body corporate, or fraudulently causes or procures the same to be done, is guilty of a felony, * * *."

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IN THE

# Supreme Court of the United States

October Term, 1965.

## No. 975.

THE ÆTNA CASUALTY AND SURETY COMPANY,
*Petitioner,*

*v.*

THIRD NATIONAL BANK AND TRUST COMPANY, OF SCRANTON,
*Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

## RESPONDENT'S BRIEF IN OPPOSITION.

ERNEST J. GAZDA,
708-12 Northeastern National Bank Building,
Scranton, Pennsylvania. 18503
*Counsel for Respondent.*

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

## INDEX.


| | Page |
|---|---|
| SUMMARY OF THE ARGUMENT | 1 |
| ARGUMENT | 2 |
| CONCLUSION | 5 |
| APPENDIX—Statutes Involved | 7 |


## TABLE OF CASES CITED.


| | Page |
|---|---|
| Diskin v. Police Pension Fund Association, 1951, 367 Pa. 273 | 4 |
| Fidelity Trust Co. v. American Surety Co. of N. Y., 268 F. 2d 805 | 1, 2 |
| Reid v. Sovereign Camp, Woodmen of the World, 1941, 340 Pa. 400, 17 A. 2d 890 | 4 |


## CODE CITED.


| | Page |
|---|---|
| Uniform Commercial Code, 12A P. S., Sections 9-105(1), (e), (g); 9-309; 12A P. S., Sections 8-102; 8-105(1); 8-201; 8-205; 8-208; 8-311; 12A P. S., Section 1-201(15), (18), (40), (43); 12A P. S., Sections 3-102(1), (e); 3-104(a); 3-401(1); 3-404 | 2, 3 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965.

No. 975.

THE AETNA CASUALTY AND SURETY COMPANY,
*Petitioner,*

*v.*

THIRD NATIONAL BANK AND TRUST COMPANY, OF SCRANTON,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## RESPONDENT'S BRIEF IN OPPOSITION.

## SUMMARY OF THE ARGUMENT.

### Point I.

The petitioner having been aware of the decision in the case of *Fidelity Trust Co. v. American Surety Co. of N. Y.*, 268 F. 2d 805, and having renewed the indemnity bond for respondent without changing the pertinent language thereof, is bound by the law of said case.

### Point II.

The substantive law of Pennsylvania does not limit the meaning of the "written instruments" to that adopted by the Pennsylvania legislature in the Uniform Commercial Code, to wit: that a written instrument means a negotiable instrument.

### Point III.

The conflict between the decision of the Court below and other circuits of the United States Courts of Appeals is not one of such great importance as to affect the public interest in general but is only of a private nature.

## ARGUMENT.

### Point I.

This case involves the interpretation of a paragraph in an indemnity bond between petitioner and respondent, specifically, paragraph E of the "Bankers Blanket Bond, Standard Form No. 24" (R. 37a). On June 23, 1959, the United States Court of Appeals for the Third Circuit, in the case of *Fidelity Trust Co. v. American Surety Co. of N. Y.*, 268 F. 2d 805, opinion written by Goodrich, Circuit Judge, decided that fictitious invoices which were in question were counterfeited written instruments according to the meaning of the term as set forth in said paragraph or clause E of the indemnity bond.

The petitioner, as well as other bonding companies, were acquainted with this decision, and the petitioner as such had the choice of changing the language of the bond or sell the bond to banks with the interpretation placed on said term in question by the said Third Circuit of the United States Court of Appeals. Having elected to sell this identical bond to the respondent for a period from May 1, 1956, to the present time, the petitioner is estopped from denying that paragraph E has any other interpretation except that set forth in said *Fidelity Trust Co.* case (*supra*). Petitioner is, therefore, bound by said decision.

### Point II.

The question whether unsigned copies of invoices are the writings embraced by the terms securities, documents or other written instruments within the coverage of the bond was not decided by the lower court in conflict with the substantive law of Pennsylvania as declared by its legislature in the Uniform Commercial Code, 12A P. S., Sections 9-105(1), (e), (g); 9-309; 12A P. S., Sections 8-102; 8-105 (1); 8-201; 8-205; 8-208; 8-311; 12A P. S., Section 1-201(15),

(18), (40), (43); 12A P. S., Sections 3-102(1), (e); 3-104 (a); 3-401(1); 3-404.

The Pennsylvania Uniform Commercial Code was adopted for the following purposes: 12A P. S., Section 1-102(2), (a), (b), and (c) which reads as follows:

> "(2) underlying purposes and policies of this Act are
>
> (a) to simplify and modernize and develop greater precision and certainty in the rules of law governing commercial transactions;
>
> (b) to preserve flexibility in commercial transactions and to encourage continued expansion of commercial practices and mechanisms through custom, usage and argument of the parties;
>
> (c) to make uniform the law among the various jurisdictions."

It is submitted that the Bankers Blanket Bond, the subject matter of this case, does not fall within the scope of the Uniform Commercial Code. It is an indemnity bond not within the purview of the said code.

It is not contended by Respondent that said fictitious invoices are to be classified as securities. It is contended, however, that they are "other written instruments" which were "counterfeited" and, therefore, within the coverage of paragraph E of said Blanket Bond.

The substantive law of Pennsylvania does not limit the meaning of the term "written instruments" to that set forth in the Pennsylvania Uniform Commercial Code (*supra*).

As stated by the lower court in its memorandum opinion, filed July 10, 1964 (memo. op. R. 61a):

> "In Pennsylvania the term 'written instruments' has been held to include petitions to strike off names from voters' registry lists, Commonwealth of Pennsylvania

v. Powers, 110 Pa. Superior Ct. 319; a railroad ticket, Commonwealth of Pennsylvania v. Wilson, 44 Pa. Superior Ct. 183; a duplicate state tax receipt, Commonwealth of Pennsylvania v. Leib, 76 Pa. Superior Ct. 413; a receipt for taxes, Commonwealth of Pennsylvania v. Phipps, 16 Phila. Rep. 457; a diploma from a college, McClure v. Commonwealth of Pennsylvania, 86 Pa. 353; receipts for pilot fees, Commonwealth of Pennsylvania v. Fitzpatrick, 3 D. R. 305; a marriage certificate, Commonwealth of Pennsylvania v. Compton, 7 Lacka. Leg. News, 108; a naturalization certificate, United States v. Randolph, 1 Pitts. 24; a miner's certificate, Commonwealth of Pennsylvania v. Wyoda, 44 Pa. Superior Ct. 552."

The lower court further stated (R. 619-61b) as follows: "Consequently, it is my determination that the term 'written instruments' in the Commercial field cannot be conclusively confined to negotiable instruments as defined in the Uniform Commercial Code."

**Point III.**

Even though there is an apparent if not real conflict between the decision of the Court below and other circuits of the United States Courts of Appeals, the conflict is not of such great importance to the public in general so as to warrant the granting of a Writ of Certiorari.

Respondent submits that this case is one of private not of national public interest. It is an agreement of indemnity between private parties. The bond was prepared and issued by petitioner. The language of the bond cannot be resolved in favor of the one who chose the words and as a business transaction issued the bond to another. *Reid v. Sovereign Camp, Woodmen of the World,* 1941, 340 Pa. 400, 17 A. 2d 890; *Diskin v. Police Pension Fund Association,* 1951, 367 Pa. 273.

## CONCLUSION.

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this court, and that the petition for a writ of certiorari should be denied.

Dated February 22, 1966.

ERNEST J. GAZDA,
*Counsel for Respondent.*

## APPENDIX.

### Statutes Involved.

### UNIFORM COMMERCIAL CODE.

*12A P. S., Section 1-102(2), (a) (b),* and *(c)* which reads as follows:

"(2) Underlying purposes and policies of this Act are

(a) to simplify and modernize and develop greater precision and certainty in the rules of law governing commercial transactions;

(b) to preserve flexibility in commercial transactions and to encourage continued expansion of commercial practices and mechanisms through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions."

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"(15) 'Document of Title' includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it entitled to receive, hold and dispose of the document and

the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

"(18) 'Genuine' means free of forgery or counterfeiting.

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"(39) 'Signed' includes any symbol executed or adopted by a party with present intention to authenticate a writing.

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(iii) is either one of a class or series or by its terms is divisible into a class or series of instruments;"

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(d) be payable to order or to bearer.

"(2) A writing which complies with the requirements of this section is . . .

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(b) A 'note' if it is a promise other than a certificate of deposit."

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